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PENDAFTAR HAKMILIK, PEJABAT TANAH DAN GALIAN NEGERI JOHOR v. HUAN KOK SY

COURT OF APPEAL, PUTRAJAYA
SUPANG LIAN JCA
HASHIM HAMZAH JCA
B AHMAD FAIRUZ ZAINOL ABIDIN J
[CIVIL APPEAL NO: J-01(NCVC)(W)-50-02-2023]
4 NOVEMBER 2024

C **Abstract** – *There is nothing in the Evidence Act 1950 ('EA') which allows the statements or findings of facts in another case to be relevant and admissible evidence in a subsequent case to decide the points which are in issue in the subsequent case, except if the judgment, order or decree sought to be admitted falls under any of the provisions of ss. 40 to 43 of the EA.*

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LAND LAW: *Sales and purchase agreement – Transfer of property – Validity – Purchaser entered into agreement with impostor – Real owner of land initiated civil suit against purchaser of land – High Court declared transfer of property void ab initio – Purchaser filed suit against Registrar of Titles ('Registrar') for negligence* E *– Whether Registrar failed to take precautionary steps or exercise reasonable care to ensure all documents submitted for transfer of ownership genuine – Whether Registrar committed breach of statutory duty – Trial judge relied on findings of judge in previous suit to dismiss evidence of witnesses and establish negligence – Whether there was misdirection causing substantial miscarriage of justice –* F *Whether order of retrial warranted*

EVIDENCE: *Judgments, orders or decrees – Relevancy and admissibility – Whether subjected to limited circumstances set out under Evidence Act 1950 – Finding of High Court Judge in previous suit relied on by trial judge – Whether fell under any of provisions under ss. 40, 41 and 42 of Evidence Act 1950 – Whether there was* G *misdirection causing substantial miscarriage of justice – Whether order of retrial warranted*

The plaintiff entered into a sale and purchase agreement ('SPA') with an impostor who claimed to be Mr Ng Chee Yau (the real owner) to purchase a piece of land ('property'). The plaintiff paid RM1,000,000 to the impostor H being the purchase price of the said property under the SPA. The plaintiff was subsequently registered as the proprietor of the said property. The plaintiff had also paid all the quit rent and outstanding maintenance charges for the said property in the sum of RM5,880.94 as part of the purchase price. However, after the transfer of the said property had been completed and I registered in the name of the plaintiff, Mr Ng Chee Yau, the real owner, initiated a civil suit ('previous suit') against the plaintiff. In the previous suit, Mr Ng Chee Yau sought, among others, to challenge the validity of the transfer of the said property to the plaintiff and to register the said property

in his name. The High Court Judge ('HCJ') in the previous suit allowed Mr Ng Chee Yau's claims. The High Court made a declaration, among others, that the transfer of the said property to the plaintiff was void *ab initio*. The HCJ also allowed the consequential orders prayed for, including that the said property be registered in the name of Mr Ng Chee Yau, the real owner. Consequently, the plaintiff filed a suit against the defendant, the Registrar of Titles in the Johor State Land and Mines Department, for negligence. The plaintiff claimed to have suffered losses due to the defendant's alleged breach of statutory duty and duty of care owed to the plaintiff. The plaintiff submitted, *inter alia*, that the defendant: (i) failed to take any precautionary steps or exercise reasonable care to ensure that all documents submitted for the transfer of ownership of the said property were genuine and valid before registering the transfer of the said property to the plaintiff; (ii) breached its duty of care by allowing a fake title to be used to register the transfer of the said property while still holding the original issue document of title ('DHKK') in its safe; (iii) failed to follow established procedure when it used the wrong type of title, *ie*, the register document of title ('DHDK') to do the registration of transfer of the said property; and (iv) breached its statutory duty by leaking a copy of the original DHKK to an unknown third party (impostor) who was not the registered owner of the said property. The defendant denied all the allegations of wrongdoing and breach of statutory duty alleged by the plaintiff. At the conclusion of the trial, the judge found that the plaintiff had proven his case against the defendant. Aggrieved, the defendant filed this appeal. The paramount issue to be determined was whether the trial judge, in finding that the defendant had breached its duty of care towards the plaintiff, had erred in considering the findings of another HCJ in the previous suit.

Held (allowing appeal; setting aside decision of High Court)
Per Hashim Hamzah JCA delivering the judgment of the court:

(1) The relevancy and admissibility of judgments, orders or decrees as evidence in any trial are subject to the limited circumstances set out under ss. 40 to 43 of the Evidence Act 1950 ('EA'). Herein, the only basis for the trial judge's finding that the defendant was negligent in allegedly allowing a registration to be made using a certified copy of DHDK instead of the original DHKK was solely based on a passage of the HCJ's findings in the previous suit. The finding of the HCJ on the grounds of judgment in the previous suit relied on by the trial judge did not fall under any of the provisions under ss. 40 to 42 of the EA. Under s. 43 of the EA, the production of a previous judgment merely establishes the existence of a prior decision of the court and nothing more. (paras 24-32)

(2) There is nothing in the EA which allows the statements or findings of facts in another case to be relevant and admissible evidence in a subsequent case to decide the points which are in issue in the subsequent

A case, except if the judgment, order or decree sought to be admitted falls under any of the provisions under ss. 40 to 43 of the EA 1950. This was applicable to both civil and criminal proceedings since it involves the general rule of evidence. As such, there was a clear misdirection on the part of the trial judge when he relied solely on the findings of the HCJ in the previous suit to dismiss the evidence of the defendant's witnesses and to establish that the defendant was negligent. This misdirection was more than sufficient to warrant appellate intervention. (paras 37 & 38)

(3) The defendant was not a party to the previous suit. In fact, one Mohammad Noor Azam Sulaiman whom the plaintiff called to give evidence in the previous suit was not even called as a witness in this case. Equally significant was the absence of any other finding by the trial judge on the credibility of the witnesses independent from the findings in the previous suit and the strength of the documentary evidence adduced. The misdirection caused a substantial miscarriage of justice for both parties. Thus, an order for a retrial was warranted in the best interest of justice. (paras 42 & 43)

Case(s) referred to:

Datuk S Nallakaruppan & Ors v. Datuk Seri Anwar Ibrahim & Other Appeals [2015] 6 CLJ 425 CA ***(refd)***

DP Vijandran v. Karpal Singh & Ors [2000] 6 CLJ 433 HC ***(refd)***

Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal [2018] 3 CLJ 427 FC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Meccilect Sdn Bhd v. Petrosab Petroleum Engineering Sdn Bhd & Anor [2023] 2 CLJ 255 CA ***(refd)***

Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd [2017] 5 CLJ 58 CA ***(refd)***

UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 40, 41, 42, 43

For the appellant - Muhammad Azzam Zainal Abidin & Arief Aiman Hamir Hamzah; SLAs

For the respondent - Pang Kong Seng & Kenny Lo Ji Yi; M/s KS Pang & Co

[Editor's note: Appeal from High Court, Johor Bahru; Civil Suit No: JA-21NCVC-39-12-2019 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Hashim Hamzah JCA:

Introduction

[1] For ease of reference, the parties in the present appeal shall be referred to as they were before the trial court below.

Background Facts

[2] Briefly, the facts in the present case are as follows.

[3] The plaintiff entered into a sales and purchase agreement dated 13 February 2016 ("SPA") with an impostor who claimed to be Mr Ng Chee Yau (the real owner) to purchase a piece of land held under Grant No. 392689, Lot No. 88359, Mukim Pulai, Daerah Johor Bahru, Johor ("the said property"). The defendant is the Registrar of Titles in the Johor State Land and Mines Department.

[4] The plaintiff paid RM1,000,000 to the impostor being the purchase price of the said property under the SPA. The plaintiff was subsequently registered as the proprietor of the said property on 20 April 2016. The plaintiff had also paid all the quit rent and outstanding maintenance charges for the said property in the sum of RM5,880.94 as part of the purchase price.

[5] However, after the transfer of the said property had been completed and registered in the name of the plaintiff, Mr Ng Chee Yau, the real owner, initiated Civil Suit No. JA-22NCvC-4-01-2018 ("the previous suit") against the plaintiff. In the previous suit, Mr Ng Chee Yau sought, among others, to challenge the validity of the transfer of the said property to the plaintiff and to register the said property in his name.

[6] The learned High Court Judge ("HCJ") in the previous suit allowed Mr Ng Chee Yau's claims. The High Court made a declaration, among others, that the transfer of the said property to the plaintiff was void *ab initio*. The learned HCJ also allowed the consequential orders prayed for, including that the said property be registered in the name of Mr Ng Chee Yau, the real owner.

[7] At this juncture, it is pertinent to note that the plaintiff did not make the defendant a party in the previous suit.

[8] Consequently, the plaintiff filed a suit against the defendant for negligence. The plaintiff claimed to have suffered losses due to the defendant's alleged breach of statutory duty and duty of care owed to the plaintiff as follows:

(i) that the defendant failed to take any precautionary steps or exercise reasonable care to ensure that all documents submitted for the transfer of ownership of the said property were genuine and valid before registering the transfer of the said property to the plaintiff;

(ii) that the defendant breached its duty of care by allowing a fake title to be used to register the transfer of the said property while still holding the original issue document of title ("DHKK") in its safe;

A (iii) that the defendant breached its duty of care by failing to follow established procedure when it used the wrong type of title, *ie*, the register document of title ("DHDK"), to do the registration of transfer of the said property; and

B (iv) that the defendant has breached its statutory duty and duty of care by leaking a copy of the original DHKK to an unknown third party (the impostor) who was not the registered owner of the said property.

[9] In his statement of claim, the plaintiff prays for the following orders, and we quote:

C (a) Gantirugi berjumlah RM1,758,140,68 atau apa-apa jumlah yang dianggap adil dan munasabah oleh Mahkamah yang Mulia ini;

(b) Faedah pada kadar 8% setahun atas jumlah di perenggan 19(a) di atas dari 29/05/2019 hingga tarikh penghakiman;

(c) Faedah pada kadar 5% setahun atas jumlah penghakiman dan tarikh D penghakiman hingga tarikh pembayaran atau realisasi;

(d) Kos

[10] The defendant denies all the allegations of wrongdoing and breach of statutory duty alleged by the plaintiff.

E **[11]** The matter went to full trial. The plaintiff and the defendant called two witnesses each. At the conclusion of the trial, the learned trial judge found that the plaintiff had proven his case against the defendant.

[12] Aggrieved with the decision of the learned trial judge, the defendant filed this appeal.

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Principles On Appellate Intervention

[13] The law is trite that an appellate court will not interfere with the findings of fact by the trial court unless the trial court is shown to be plainly wrong, for instance, when the trial court is guilty of no or insufficient judicial G appreciation of evidence (see *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441; *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1).

H **[14]** We agree with His Lordship Harmindar Singh Dhaliwal JCA (now FCJ) in *Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd* [2017] 5 CLJ 58, in which it was held as follows:

> [20] Nevertheless *there are occasions when appellate interference is warranted* and these occasions have been well set out in numerous cases. Some of these occasions are:

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(a) *where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations* (see *Director of Forestry, Sabah & Anor v. Mau Kam Tong & Ors And Another Appeal* [2010] 3 CLJ 377; [2010] 3 MLJ 509);

(b) *where there was no proper evaluation of the evidence by the trial judge* (see *Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626; [2009] 6 MLJ 1);

(c) where the decision arrived at by the trial court was *without judicial appreciation of the evidence* (see *Gan Yook Chin & Anor v. Lee ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1);

(d) where a trial court has so *fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion* (see *Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sn Seltra Sdn Bhd* [2008] 2 CLJ 284; [2008] 2 MLJ 87);

(e) where the trial judge was *plainly wrong in arriving at his decision* (see *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97);

(f) where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, *has not properly analysed the entirety of the evidence which was given before him* (see *First Count Sdn Bhd v. Wang Yew Logging & Plantation Sdn Bhd* [2013] CLJU 625; [2013] 1 LNS 625; [2013] 4 MLJ 693 which followed the Privy Council case of *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] CLJU 40; [1984] 1 LNS 40; [1984] 2 MLJ 165); and

(g) where the *judgment is based upon a wrong premise of fact or of law* (see *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] CLJU 1416; [2012] 1 LNS 1416; [2012] 4 MLJ 149). (emphasis added)

[15] Bearing the abovementioned principles in mind, we now turn to consider the issues raised by the parties to this appeal.

Issue

[16] Learned Senior Federal Counsel ("SFC") for the defendant raised several issues to be determined by this court in their memorandum of appeal. However, we are of the view that the paramount issue to be determined in this appeal is whether the learned trial judge, in finding that the defendant had breached its duty of care towards the plaintiff, had erred in considering the findings of another HCJ in the previous suit.

Our Findings

[17] Learned SFC for the defendant submitted that the learned trial judge had erred in considering the findings of another HCJ in the previous suit in finding that the defendant had breached its duty of care towards the plaintiff.

[18] We have gone through the appeal records and, most importantly, the learned trial judge's grounds of judgment. We found that the only basis for the learned trial judge's finding that the defendant was negligent in allegedly allowing a registration to be made using a certified copy of DHDK instead of the original DHKK was solely based on a passage of the learned HCJ's findings in the previous suit.

[19] The relevant passage of the learned trial judge's grounds of judgment is reproduced below:

> [21] I will first deal with *the issue of whether the Defendant was negligent in allowing a registration to be made using a certified copy of DHDK instead of the original Issue Document of Title (DHKK),* which was still kept by the Defendant
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> [22] *It is pertinent to note that Justice See Mee Chun has stated in the grounds of judgment in the Previous Suit* (see pages 18 and 19 of the Plaintiff's Bundle of Documents) as follows:
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> > The evidence of PW2 was that the documents presented at the Land Office for the transfer to the Oft was the title as in B/225-227, which was DHDK *ie*, Dokumen Hakmilik Dalam Komputer. This is consistent with PW5's evidence he presented the title to the Land Office. *The evidence of PW2 was that when the physical title to the property was issued it would have to be given to the person applying for the transfer and in this instance it was not shown in PB where there was no record of it being collected This meant the document would he kept in PTG.* A DHDK document such as B/225-227 could not be used for the presentation of the transfer but in fact it was. Although that document could not be presented for transfer, this does not without more renders it a fake title. This is because the chop at the right in B/225 showed it was a certified true copy and the chop at B/226 a/so showed it a certified true copy by the Assistant Registrar. *Further it was not PW2's evidence the title was fake but rather the evidence was it could not have been presented for registration.*
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> (emphasis added)

[20] The learned trial judge even dismissed the evidence of Md Hasanuddin bin Mohmad Hasim, Penolong Pengarah Pendaftaran Hakmilik Pejabat Pengarah Tanah dan Galian Negeri Johor ("DW1") and Nurul Sa'idah binti Mohameda, Pembantu Tadbir at Pejabat Pengarah Tanah dan Galian Johor ("DW2") that the original DHKK was submitted to affect the transfer of the said property to the plaintiff.

[21] The sole reason for the learned trial judge's dismissal of DW1's and DW2's evidence was that their evidence contradicted the finding of fact made by the learned HCJ in the previous suit, as quoted above.

[22] On this, the learned trial judge, in his grounds of judgment, went on to say:

[23] *I am persuaded by the Plaintiff's submission that the testimony of both the Defendant's witnesses as seen in para 13 above should be given less weightage or no value at all as those testimonies contradict the unchallenged finding of fact by Justice See Mee Chun in the Previous Suit.* The Defendant did not tender any documentary evidence or produce any witness to challenge the allegations of the wrongful action and/or negligence as pleaded by the Plaintiff, Instead, the Defendant only disagrees with the findings of facts by Justice See Mee Chun during the trial in the Previous Suit The Defendant argues that the above-mentioned Mr Mohamad Noor Azam bin Sulaiman actually corrected his stand during the last part of the cross-examination and stated that the registration of transfer of the said property actually used the DHKK title and not the DHDK title, as mentioned by him during cross-examination. However this submission is unconvincing since the undisputed evidence is that the DHKK title remains in the "Bilik Kebal" and was never collected by the real owner. (emphasis added)

[23] We would, therefore, address this issue as follows.

[24] We hold that the relevancy and admissibility of judgments, orders, or decrees as evidence in any trial are subject to the limited circumstances set out under ss. 40 to 43 of the Evidence Act 1950 ("EA 1950").

[25] For ease of reference, ss. 40 to 43 of the EA 1950 are set out below.

[26] Section 40 of the EA 1950 reads:

Section 40. Previous judgments relevant to bar a second suit or trial.

The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether the court ought to take cognizance of the suit or to hold the trial. (emphasis added)

[27] Section 41 of the EA 1950 states that:

Section 41. Relevancy of certain judgments in probate, *etc.*, jurisdiction.

(1) *A final judgment, order or decree of a court, in the exercise of probate, matrimonial, admiralty or bankruptcy jurisdiction,* which *confers upon or takes away from any person any legal character,* or which *declares any person to be entitled to any such character,* or to be entitled to any specific thing, not as against any specified person but absolutely, *is relevant when the existence of any such legal character* or the title of any such person to any such thing *is relevant.*

(2) Such judgment, order or decree *is conclusive proof* –

(a) that any legal character which it confers accrued at the time when the judgment, order or decree came into operation;

(b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when the judgment, order or decree declares it to have accrued to that person;

A (c) that any legal character which it takes away from any such person ceased at the time from which the judgment, order or decree declared that it had ceased or should cease; and

(d) that anything to which it declares any person to be so entitled was the property of that person at the time from which the judgment, order or decree declares that it had been or should be his property.
B (emphasis added)

[28] Section 42 of the EA 1950 stipulates that:

Section 42. Relevancy and effect of judgments, orders or decrees other than those mentioned in section 41.

C *Judgments,* orders or decrees *other than those mentioned in section 41 are relevant if* they *relate to matters of a public nature relevant to the inquiry;* but such judgments, orders or decrees are not conclusive proof of that which they state. (emphasis added)

[29] Section 43 of the EA 1950 states that:
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Section 43. Judgments, *etc.*, other than those mentioned in sections 40 to 42 when relevant

Judgments, orders or decrees *other than* those mentioned in *sections 40, 41 and 42* are *irrelevant unless the existence of such judgment,* order or decree *is a fact in issue or is relevant* under some *other provision of this Act.*
E (emphasis added)

[30] In particular, illustration (a) to s. 43 of the EA 1950 clearly mentions as follows:

ILLUSTRATIONS

F (a) **A and B separately sue C for a libel** which reflects upon each of them. C in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. **The fact is irrelevant as between B and C.**
G (emphasis added)

[31] Turning to the facts of the present case, we found that the finding of the learned HCJ on the grounds of judgment in the previous suit relied on by the learned trial judge did not fall under any of the provisions under ss. 40 to 42 of the EA 1950 above.
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[32] We are of the considered view that under s. 43 of the EA 1950, the production of a previous judgment merely establishes the existence of a prior decision of the court and nothing more.

[33] We affirm our earlier decision in *Datuk S Nallakaruppan & Ors v. Datuk*
I *Seri Anwar Ibrahim & Other Appeals* [2015] 6 CLJ 425; [2015] 4 MLJ 34 in which it was held as follows:

[21] *Our s. 43 is in pari materia with s. 43 of the Indian Evidence Act.* Based on the Indian authorities cited to him, learned judicial commissioner concluded that *the rationale for the enactment s. 43 is that every case is to be treated as a class by itself;* and *the production of a previous judgment merely establishes the existence of a prior decision. There is no presumption that a prior judgment is the correct decision on the matter.* What the law of *res judicata* establishes is that one cannot go behind the decision in certain similar factual cases based on the ground of public policy. *The fact in issue in each case must be proved independently.*

[22] The rational underlying s. 43 can be gleaned from the statement in *Hollington*'s case which is as follows: 'The Court which has to try the claim for damages knew nothing of the evidence that was before the criminal. court. It cannot know what arguments were addressed to the court or what influence the court in arriving at its decision. Moreover; the issue in the criminal proceeding in not identical with that raised in claim for damages. In other words, as said in the Indian case of *Gopalkrishna Gupthan v. Ammalu Ammal And Ors* AIR 1972 Ker 196:

> ... it is the duty of the court to scrutinize the soundness or validity of opinion evidence exercising its own independent judgment. In the case of a previous judgment such scrutiny is impossible because the court trying the subsequent case cannot reopen the case and hear it on the merits as if the court is hearing an appeal or is retrying the previous case on fresh evidence. The court in the subsequent case has to decide it on the materials before it exercising its own independent judgment ...

[23] In the face of overwhelming authorities locally and from foreign jurisdictions in particular UK (before the statutory intervention) and India that had been considered by the learned judicial commissioner that a judgment in a criminal case cannot be used as proof of a fact in issue in a civil case for claim for damages, we are inclined, as the learned judicial commissioner did, to agree with the above statement.

[24] Therefore, with regard to the defendants' defence of justification, *we are in agreement with the learned judicial commissioner that s. 43 of the Evidence Act would be a bar to the defendants to rely on the judgment or order or decree of another court proceeding* more so it is a criminal proceeding. (emphasis added)

[34] As a matter of fact, the learned trial judge had actually admitted certain passages from the learned HCJ's grounds of judgment in the previous suit to diminish the value of the evidence by the defendant's witnesses and as evidence of negligence on the part of the defendant.

[35] A considerably similar issue was raised in *DP Vijandran v. Karpal Singh & Ors* [2000] 6 CLJ 433; [2000] 3 MLJ 22 in which the defendant, in that case, sought to attack the plaintiff's character by admitting as evidence certain passages from the judgment of the Court of Appeal in a separate criminal proceeding.

[36] In addressing this issue, Kamalanathan Ratnam J (as he then was) held as follows:

> There is no doubt that the existence of the judgment of the Court of Appeal is not a fact in issue in this case. *Admittedly what the first defendant is seeking to do is to admit a certain passage from the judgment of the Court of Appeal as evidence in this case. It is clear that established authorities are totally against the first defendant on this score. Sarkar on Evidence* (15th Ed) Vol 1 states at p. 839 para. 2 as follows:
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> > *The object behind enacting s 43 appears to be two fold: (1) to treat every case a class by itself so that the judgment delivered in one case may not be availed of by parties to another case; and (2) to maintain the independence of courts by preventing the parties from submitting before the court hearing their case the judgments of other courts.*
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> Again at p 839 para 4:
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> > *There is no provision in the Act by which the actual decision or the findings arrived at in a previous judgment can be used as evidence to decide the points which are in issue in a particular case.* Such a decision may operate as *res judicata* or be relevant under ss. 40-42 to prove assertion of a right, but otherwise it is no better than a mere opinion expressed on the issues in a particular case and opinion is relevant in those cases only in which it is specially referred in the Act and in no others (*Purnima v. Nandlal* PLT 582 *Ramparekha v. Ramjhari* AIR 1933 P 690; *Hitendra v. Rameswar* AIR 1925 P 625). Statements of facts in a previous judgment is not admissible under s 43 in a subsequent case to decide any points in issue (*Khubnarain v. Ram* Ch AIR 1951 P 340).
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> Almost 70 years ago, the Privy Council had occasion to consider this issue. This is what his Lordship Sir John Wallis had to say at p 102 of *Kumar Gopika Raman v. Atal Singh* AIR 1929 PC 99:
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> > ... The Indian Evidence Act does not make finding of fact arrived at on the evidence before the court in one case evidence of that fact in another case.
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> From this case and the numerous authorities cited it seems to me the law that the production of a previous judgment merely establishes the existence of a prior decision. There is no presumption that a prior judgment is the correct decision on the matter. What the law of *res judicata* establishes is that one cannot go behind the decision in certain similar factual cases based on the ground of public policy. In *Gopalkrishna Gupthan v. Ammalu Ammal* AIR 1972 Ker 196, Narayana Pillai J said at p 197:
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> > *... Judgments not coming under ss. 40 to 42 are not relevant at all in respect of opinion expressed therein. They can amount only to opinion evidence and opinion evidence is generally inadmissible.* Such opinion evidence is, however, admitted under s. 45 of the Evidence Act when the court has to form an opinion upon a point of foreign law, or of science or art or as to identity of handwriting but in such cases it is the duty of the court to scrutinise the soundness or validity of opinion

> evidence exercising its own independent judgment. In the case of a previous judgment such scrutiny is impossible because the court trying the subsequent case cannot reopen the case and hear it on the merits as if the court is hearing an appeal or is retrying the previous case on fresh evidence. *The court in the subsequent case has to decide it on the materials before it exercising its own independent judgment Therefore my conclusion is that judgments qua judgments and as expression of opinion of the courts which pronounce them are not relevant at all except under ss. 40 to 42 of the Evidence Act.*
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> I agree and accept the views of the learned judge. I am therefore compelled to conclude that *there is nothing in the Evidence Act to warrant the conclusion that the statements or findings of facts in another case can be used as evidence in a subsequent case to decide the points which are in issue in the subsequent case.* (emphasis added)

[37] We agree and endorse the decision in *DP Vijandran* (*supra*) and reiterate that there is nothing in the EA 1950 which allows the statements or findings of facts in another case to be relevant and admissible evidence in a subsequent case to decide the points which are in issue in the subsequent case, except if the judgment, order or decree sought to be admitted falls under any of the provisions under ss. 40 to 43 of the EA 1950. In our mind, this is applicable to both civil and criminal proceedings since it involves the general rule of evidence.

[38] As such, it is clear to us that there was a clear misdirection on the part of the learned trial judge when he relied solely on the findings of the learned HCJ in the previous suit to dismiss the evidence of the defendant's witnesses and to establish that the defendant was negligent. In our mind, this misdirection is more than sufficient to warrant appellate intervention on our part.

[39] The next issue to be addressed is whether this misdirection has occasioned a substantial wrong or a substantial miscarriage of justice.

[40] Our learned sister Mariana Yahya JCA, speaking for this court in *Meccilect Sdn Bhd v. Petrosab Petroleum Engineering Sdn Bhd & Anor* [2023] 2 CLJ 255; [2023] 2 MLJ 208, had clearly stated as follows:

> [19] *It is trite that ss. 60 and 71 of the Courts of Judicature Act 1964 provide the power to the Court of Appeal* to confirm, reverse or vary the decision of the High Court or *may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court,* or may make such other order in the matter as to it may seem just. Sections 60 and 71 of the Courts of Judicature Act 1964 provide as follows:
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> Section 60 Powers of Court of Appeal
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> (1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may

thereupon confirm, reverse or vary the decision of the trial court, or *may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court,* or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

(2) At the hearing of an appeal the Court of Appeal may, if it thinks that a different sentence should have been passed, quash the sentence passed by the trial court and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed.

(3) The Court of Appeal shall in no case make any order under this section as to payment of costs of any appeal to or by the appellant or respondent

Section 71 New trial

(1) Except as hereinafter provided the Court of Appeal shall have power to order that a new trial be had of any cause or matter tried by the High Court in the exercise of its original or appellate jurisdiction.

(2) *A new trial shall not be granted on the ground of improper admission or rejection of evidence unless in the opinion of the Court of Appeal some substantial wrong or miscarriage of justice has been thereby occasioned;* and if it appears to the Court of Appeal that the wrong or miscarriage affects part only of the matters in controversy or some or one only of the parties, the Court of Appeal may give final judgment as to part thereof, or as to some or one only of the parties, and direct a new trial as to the other part only or as to the other party or parties.

(3) A new trial may be ordered on any question without interfering with the finding or decision of the court below upon any other question.

[20] We are guided by the principle and approach set out by Lord Phillips MR in *English v. Emery Reimbold & Strick Ltd; DJ & C Withers (Farms) Ltd v. Ambic Equipment Ltd; Verrechia (trading as Freightmaster Commercials) v. Commissioner of Police of the Metropolis* [2002] 3 All ER 385 (CA) which the same principle had been adopted by our Federal Court in *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 and most recently in *Yeo Ping Tieng & Ors v. Elitprop Sdn Bhd* [2020] 3 MLJ 269; [2020] 1 CLJ 776 wherein Lord Phillips MR said under the heading *'The Approach of the Appellate Court'*:

> [26] Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, *the appellate court should first review the judgment, in the context of material evidence and submissions at the trial, in order to determine whether, when all these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed.* This was the approach adopted by this Court in the light of *Flannery*'s case, in *Ludlow v. National Power plc* [2000] All ER (D) 1868. *If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing, or to direct a new trial.* (emphasis added)

[41] We are also guided by the Federal Court's decision in *Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal* [2018] 3 CLJ 427; [2017] MLJU 2093 in which it was held as follows:

> Retrial
>
> [49] The conditions for this Court to order a retrial in civil cases is provided in section 100 of the CJA:
>
> > New trial
> >
> > 100(1) Except as hereinafter provided, the Federal Court shall have power to order that a new trial be had of any cause or matter tried by the High Court in the exercise of its original or appellate jurisdiction.
> >
> > (2) A new trial shall not be granted on the ground of improper admission or rejection of evidence unless in the opinion of the Federal Court some substantial wrong or miscarriage of justice has been thereby occasioned; and if it appears to the Federal Court that the wrong or miscarriage affects part only of the matters in controversy or some or one only of the parties, the Federal Court may give final judgment as to part thereof, or as to some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties.
> >
> > (3) ...
>
> [50] Section 100(2) of the CJA expressly sets out the limited grounds on which a new trial may be granted. Section 101 of the CJA goes on to provide that immaterial errors are not a valid basis for the Court to order a new trial:
>
> > Immaterial errors
> >
> > 101. No judgment or order of the High Court, or of any Judge, shall be reversed or substantially varied on appeal, nor a new trial ordered by the Federal Court, on account of any error, defect, or irregularity, whether in the decision or otherwise, not affecting the merits or the jurisdiction of the Court.

A [51] The combined effect of both sections is to place the burden on the party seeking retrial to satisfy the Court that *there was some substantial wrong or miscarriage of justice occasioned by the trial court, which has affected the merits or the jurisdiction of the Court.* For instance, in *Udham Singh v. Indar Kaur* [1971] 2 MLJ 263, this Court ordered a new trial on the basis of a misdirection by the trial judge. The trial judge had wrongly placed the B burden of proving testamentary incapacity, and it was held that the misdirection had occasioned a substantial wrong.

[52] The Court of Appeal had an occasion to consider a similar issue in *Tan Ah Tong v. Gee Boon Kee & Ors* [2006] 2 MLJ 618. In that case, no grounds of judgment were issued, for the trial judge had retired soon after C the decision was delivered. The Court of Appeal declined to grant a new trial on that basis, in the words of Abdul Aziz Mohamad JCA (as he then was):

> ... Where a judge does not state his reasons for arriving at his decision, the decision is not necessarily unsafe. He may have D properly considered and weighed the evidence and may have arrived at the right conclusions. The decision is only unsafe in the sense that the appellate court is unable to determine, from an assessment of the judge's mental processes, that the decision is correct. But it does not follow that the course open to the appellate court to decide the appeal while doing justice is to order a new E trial. It is still open to the appellate court to assess the evidence and come to a finding whether or not the evidence vindicates the decision of the trial judge.
>
> Where, in an appeal in a civil matter, as in this appeal, reasons for the decision appealed against are not available, and not obtainable, the appeal, onerous though this may be, should proceed on an F examination and assessment of the evidence to enable the appellate court to decide whether the evidence justifies the decision or otherwise, it will be as if the appellate court is sitting at first instance, except that the evidence is already before it. For reasons that are obvious or can easily be imagined, a new trial is G undesirable and ought not to be ordered unless there is something crucial to a just decision in the case that can be established in the new triai but cannot be established on an assessment of the evidence. The evidence being all there already, such a thing must be very rare indeed.

H [53] On this point, we find the lucid remarks of Abdul Aziz Mohamed JCA (as he then was) illuminating and we endorse the passages quoted above.

[54] In the instant case, the statutory requirements for a retrial have not been established by Dr Hari and Dr Namazie We do not consider that the non-speaking judgment of the High Court, or the retirement of two I panel judges at the time the Court of Appeal issued their written grounds of judgment, constitutes a substantial wrong or a miscarriage of justice

that affected the merits or jurisdiction of the High Court. Further, we note that the Court of Appeal was able to, and had in fact, proceeded with the appeal and made a determination by considering all the evidence in the records of appeal available to them. *There was sufficient material for the Court of Appeal to make the relevant findings and reach a decision as if it was sitting in the first instance. For these reasons, a retrial or a rehearing is not warranted.*

[55] We would like to add that a retrial or a rehearing should not be easily ordered. Appellate courts are advised to avoid ordering a retrial, merely on account of a non-speaking judgment by the trial judge or the absence of any finding of fact on a particular issue. In such a situation, it is the duty of the appellate court to endeavour to make its own finding offset, based on the evidence available in the record of appeal.

[56] A retrial may be unduly prejudicial to the parties and an unnecessary inconvenience to the witnesses. This is especially so in this case, where the alleged negligence occurred in September 1999, more than 17 years ago. The trial commenced in year 2007 and only concluded in year 2010, after a protracted trial spanning 23 days and involving 10 witnesses, including 7 medical professionals. A retrial would be contrary to the best interests of justice, and is in any event unwarranted in the circumstances of this case. (emphasis added)

[42] In the present case, it is important to note that the defendant was not even a party to the previous suit. In fact, En Mohammad Noor Azam bin Sulaiman, whom the plaintiff called to give evidence in the previous suit, was not even called as a witness in this case. There is also evidence that En Mohammad Noor Azam bin Sulaiman had corrected his stand during the cross-examination in the previous suit which led to a scrutiny against the decision of the learned HCJ in the previous suit in this appeal, which we do not wish to elaborate on further. Equally significant is the absence of any other finding by the learned trial judge on the credibility of the witnesses independent from the findings in the previous suit and the strength of the documentary evidence adduced.

[43] For the above reasons, we are of the opinion that the misdirection caused a substantial miscarriage of justice for both parties. Based on the surrounding facts of the present case, we are of the view that an order for a retrial is warranted in the best interest of justice.

Conclusion

[44] In conclusion, based on all of the above, we find that there is a clear misdirection on the part of the learned trial judge, which warrants our appellate interference. With this, we allow the appellant's appeal and we set aside the decision of the High Court dated 5 January 2023 and we order for the case to be remitted and retried before another High Court Judge.